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No. 459

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

DOMINIC DANIEL AIRDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on June 19, 1967.

Citations to Opinion Below

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix A hereto, **infra**, p. App. 1, is as yet unreported.

Jurisdiction

The judgment of the United States Court of Appeals was entered on June 19, 1967. A timely petition for rehearing was denied on July 12, 1967. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented for Review.

1. Whether the word "unlawfully" in an indictment for possessing a television set which had been stolen from an interstate shipment in violation of Title 18, United States Code, Section 659, can supply the element of knowledge on the part of the defendant that the set was stolen, which element was otherwise not set forth in the indictment, but which is an element of the crime defined by Title 18, United States Code, Section 659.

2. If "the principle object of the Fourth Amendment is the protection of privacy rather than property" *Warden* v. *Hayden,* ..... U. S. .....; *Jones* v. *United States,* 362 U.S. 257, could the consent to search petitioner's apartment given by his paramour with whom he shared the apartment, authorize an otherwise unlawful invasion of the petitioner's privacy by agents of the F.B.I.

3. Whether the consent, if any, given by the petitioner's paramour to the search of the apartment which she shared with the defendant was given under such circumstances as to have been coerced.

4. Whether the use by the government in the trial of the case, of admissions made by the defendant in support of his motion to suppress evidence, constituted a denial of the defendant's rights under the Fifth Amendment not to be compelled to be a witness against himself.

Statement of the Case

The petitioner, Dominic Daniel Airdo, was indicted by the grand jury of the Northern District of Illinois for unlawfully buying, receiving, and having in his possession a Muntz television set of a value in excess of $100.00, which had been embezzled, stolen, and unlawfully taken, carried away, concealed and by fraud and deception obtained from a motor truck and depot of Joseph T. Ryan Cartage Company, Inc. and which was moving as, which was a part of, and which did constitute an interstate shipment of freight from Muntz TV Inc., Wheeling, Illinois, to Hager, Inc., Bridgeport, Connecticut; in violation of Title 18, United States Code, Section 659.

The facts concerning the theft of the television set from interstate commerce are undisputed. (See stipulation, App. 35-39)* The television set was last seen when a truck upon which it was loaded was assigned to a driver known only as Tony Rodi, 3003 South Princeton, Chicago, Illinois, on July 21, 1965. (App. 37) The trailer was to be delivered by the Joseph T. Ryan Cartage Company, Inc. to Lifschultz Fast Freight. Rodi failed to call in on July 21, 1965, as required by the J. T. Ryan Cartage Company, Inc. The trailer was found empty on July 23, 1965, at 1512 West

* Page references are to the pages of the Appendix printed for use in the Court of Appeals. Nine copies of the Appendix have been furnished.

39th Street, Chicago, Illinois. (App. 38) The government did not contend that the defendant, Airdo, was the driver, Tony Rodi.

As far as the evidence shows, the television set was next seen by personnel from the J. T. Ryan Cartage Company, Inc. and by Federal Bureau Investigation agents on October 19, 1965, at the apartment of the defendant, which is located at 1433 South 51st Avenue, Cicero, Illinois.

The petitioner lived at 1433 South 51st Avenue, Cicero, Illinois, with a young woman by the name of Mary Hilan, who was not his wife.

On October 19, 1965, Special Agents, Antonius Genakos and John K. Chadwick of the Federal Bureau of Investigation, went to the petitioner's apartment. They rang the bell and the door was opened by Miss Hilan. The apartment was on the second floor of the building and Miss Hilan had to descend a flight of stairs to open the door leading from the front vestibule of the building to the apartment. Genakos gave his version of what occurred at that time: (App. 48)

> "We identified ourselves to her at this time. We showed her our credentials, advised her of our names, and told her we were special agents with the Federal Bureau of Investigation. She stated that she had her nineteen month old baby upstairs. We told her we wanted to talk to her concerning an official investigation. She told us that she would prefer that this be done up in her apartment since she had her baby up there and she did not want to leave the baby alone. That was all the conversation that took place until we got into her apartment."

Then, Genakos related: .(App. 46)

> "At this point, Special Agent Chadwick advised her that we were investigating the theft of some Muntz TV sets which had occurred on July 21st from the J. T. Ryan Company. He then advised her that it was our understanding, we had received information that she was possibly in possession of one of those television sets which had been stolen. He requested her consent to examine the television set which she had in the apartment, advising her that she did not have to consent since we did not have a search warrant, that we had no right to search, that if she wanted to she could call an attorney, consult with an attorney before consenting to the search; and also she could call anyone else that she might want to. She advised that she had nothing to hide and she was perfectly willing to allow us to examine the television set, at which point we did examine the television set and found that the identifying number on the television set corresponded with a number on some freight bills which were in Mr. Chadwick's possession."

Mary Hilan relates the story in the following manner: (App. 14-15)

> "On October 19, 1965, I was awakened by the doorbell. This was approximately 8:30 in the morning. At that time, my daughter and I were home. I was in bed sleeping when the doorbell rang. I had pajamas on and I grabbed the robe when the bell rang. When the bell rang, I grabbed the robe and I went downstairs. * * * [I] went to my door, unlocked it and left it open to go down the stairs and answer the doorbell.

I opened the door and there was two men standing there. They put a card in my face and said they were FBI agents and they then walked up the stairs. In the middle of the stairs—I was still downstairs at the door closing the door, they were in the middle of the stairs, and I asked them what they wanted. They said, 'We want to talk to you.' Well, at this time, they were at the top of the stairs. My door was open to my apartment and they pointed at a TV set and they said, 'That's what we want to talk to you about.' At the time, the men were in my doorway. I said, 'What do you want to talk—why do you want to talk about that?'' No, I said, 'What about that?' And he said, that's a stolen TV set.' I said, No, it isn't, not that I know of.' And they said, 'Well,' at this time they were in my front room and they asked if they could look at the TV and I said, yes. They asked if they could take the back off to check a serial number inside because there was no serial number on the back of it. I said, 'Yes.' They stayed in my apartment about an hour and a half.' ''

The trial court at the hearing on the Motion to Suppress was more concerned with the relationship of the petitioner and Miss Hilan than with the question of the legality of the search. He couched his ruling in the following terms: (App. 20-21)

''The Court: The law requires that a person in order to avail himself of such constitutional right be legitimately on the premises. Neither one of these people are legitimately on the premises. They are living in open and notorious adultery. Neither one of them is legitimately on the premises or has ever been

because the defendant has testified that he is married, 37 years old, living with a woman 21 years old. Unless he is legitimately on the premises, I don't think he can avail himself of the privileges which he raises here, and I don't by that statement mean to say that there has been any case of an unreasonable search and seizure here.

"The Motion of the defendant to suppress evidence will be denied."

The Court of Appeals, holding that, "The 'legitimately on the premises' test, drawn from *Jones* v. *United States*, 362 U.S. 257, 267 (1960), relates only to the right of the person claiming the privacy of certain premises to be where the search occurred, not to his moral fibre," concluded that the petitioner had the requisite standing to challenge the reasonableness of the search.

At the trial of the case, the government introduced in evidence, the testimony of the petitioner which had been given at the hearing on the motion to suppress. The defendant objected and the objection was overruled. (App. 39-42). In this testimony, the defendant had made certain admissions concerning the possession of the stolen television set.

Reasons for Granting Writ

1. The crime for which the defendant was indicted and of which he was convicted is defined as follows: Title 18, United States Code, Section 659:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, * * * from any * * * motor truck * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;
>
> * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than 10 years, or both; * * *.

The indictment in this case charges that the defendant,

> did unlawfully buy, receive, and have in his possession, a certain chattel * * * which had been embezzled, stolen, and unlawfully taken, carried away, concealed and by fraud and deception obtained from a motor truck and depot of Joseph T. Ryan Cartage Company, Inc., and which was moving as, which was a part of, and which did constitute an interstate shipment of freight * * *.

The indictment failed to contain the averment that the defendant possessed the chattel "knowing the same to have been embezzled or stolen."

The Court of Appeals disposed of the question by saying:

> In the context in which it appears in the instant indictment, the word "unlawfully" supplies the required element of knowledge. Possession of a tele-

vision set recently stolen from an interstate shipment could be "unlawful" under 18 U.S.C. Sec. 659 only if the possession were accompanied by knowledge that the set had been stolen. The recitations of the indictment necessarily imply knowledge and the statute is satisfied, if not by the statutory terms, by "words of similar import." *United States* v. *Salliey,* 360 F.2d 699, 701 (4th Cir. 1966); *United States* v. *Martell,* 335 F.2d 764, 765-66 (4th Cir. 1964). There is no question in view of the language used, that the indictment adequately informed the defendant of the charge with which he was faced and that it protects him against a second conviction for the same offense. Nor can the defendant claim that he was prejudiced in any way by the absence of a specific allegation of knowledge. The defendant raised no objection to the omission at the trial. The question whether he knew that the television set had been stolen was the principal issue in the case and the jury was instructed that the defendant could not be found guilty unless such knowledge had been established.

The opinion of the Court of Appeals is at odds with holdings of other courts of appeals and with one of its own prior decisions which it ignored.

For example, in *United States* v. *Manuszak* (3 Cir., 1956) 234 F.2d 421, the Court of Appeals for the Third Circuit had occasion to construe a different aspect of the same statute as is involved in this case. The statute requires that the theft from the interstate shipment be from a "railroad car, wagon, motor truck, or other vehicle, or from any station, station house, platform, or depot or from any steamboat, vessel or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility." For the first time in the Court of Appeals, the defendant raised the question that the indict-

ment did not contain "any charge as to the specific place or facility from which the goods were taken; accordingly, an essential element of the crime is lacking, which circumstance renders the indictment invalid." 234 F.2d 421, 423.

The Court of Appeals agreed with the appellant's contention ruling:

> Nowhere in the language of count 1 can allegations be found specifying the place or facility from which the goods were taken. For this reason the count is a nullity as a charge of a federal crime and should be quashed. The defect is not one of form which will be overlooked after a verdict when no prejudice is shown. Although after a verdict every intendment should be indulged in support of the count, neither the verdict nor the evidence supporting the verdict can be used as a basis for dispensing with the rule that the indictment must state all the essential ingredients of the crime. See *Hagner* v. *United States,* 1932, 285 U.S. 427, 433, 52 S.Ct. 417, 76 L.Ed. 861; *United States* v. *Debrow,* 1953, 346 U.S. 374, 376, 74 S.Ct. 113, 98 L.Ed. 92; *United States* v. *Tornabene,* 3 Cir. 1955, 222 F.2d 875; *United States* v. *Amorosa,* 3 Cir., 1948; 167 F.2d 596, 598.

The Ninth Circuit rule is stated in *Carlson* v. *United States* (9 Cir., 1961) 296 F.2d 909. There the appellant was convicted of the crime defined by Title 18 U.S.C. Section 35. The indictment charged that he:

> "* * * did wilfully impart and convey to Gayle Zimmer, a stewardess, false information concerning an alleged attempt being made to wilfully place a destructive substance, to-wit: explosives, upon American Airlines Flight number 8, a civil aircraft used, operated and employed in interstate commerce, well knowing such information to be false."

For the first time on appeal, the defendant contended that the indictment was defective and that it failed to contain an essential element of Title 18 U.S.C. Section 35 (as that statute then read) because it did not state that the destructive substance was placed upon the airliner for the purpose of damaging or destroying it. The court reversed the conviction holding that because of the failure of the information to contain this element of the crime, it did not charge a crime.

In *Robinson* v. *United States* (10 Cir., 1959) 263 F.2d 911, the Tenth Circuit stated its rule succinctly:

> An indictment charging an offense under 21 U.S.C.A. Sec. 174 must allege that the accused knew that the contraband was imported or brought into the United States contrary to law. The instant indictment fails to make this essential allegation and this fails to state a public offense. We are in accord with the views of the Seventh Circuit expressed in *United States* v. *Calhoun,* 257 F.2d 673, that the defect cannot be considered as an obvious technicality nor disregarded under Rule 52(a), Federal Rules of Criminal Procedure, 18 U.S.C.A. as "harmless error."

In *United States* v. *Calhoun,* (7th Cir., 1958) 257 F.2d 673, the Court of Appeals for the Seventh Circuit held in the fashion stated by the Tenth Circuit in the *Robinson* case above.

While some courts have rejected *Robinson* and *Calhoun,* (*Stein* v. *United States,* (9 Cir., 1962) 313 F.2d 518; *United States* v. *Mixon,* (6 Cir. 1967) 374 F.2d 20). they seemingly have done so on the basis that in an indictment for conspiracy, it is not necessary to allege with technical precision all of the elements essential to the commission of the offense which is the object of the conspiracy, or to state such object with the detail which would be required in an indictment for committing the substantive offense.

Because the opinion in this case is in direct conflict with the rulings of a number of other circuits, certiorari ought to be granted to resolve this conflict.

2. Our second point presents a question concerning third party consents to search. In this case, the search was of the defendant's apartment which was made with the consent not of the defendant, but of a young woman with whom the defendant lived. There was no contention ever made in any of the courts below that the search was made pursuant to a search warrant, a lawful arrest or the consent of the defendant.

The Court of Appeals upheld the validity of the search by reiterating the rule that, "where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either."

This rule has received recent academic criticism. (*Third Party Consent to Search and Seizure,* 33 U. Chi. L. Rev. 797; *Consent Searches: A Reappraisal After Miranda* v. *Arizona,* 67 Colum. L. Rev. 130; *Interspousal Consent to Unreasonable Searches and Seizures,* 40 Conn. B. J. 351, and see notes, 51 Cornell L.Q. 795 and 79 Harv.L.Rev. 1513) In addition, it seems to be contrary to the recent rulings of this court that the rights protected by the Fourth Amendment are rights of privacy not property. *Jones* v. *United States,* 362 U.S. 257; *Stoner* v. *State of California,* 376 U.S. 483; *Warden* v. *Hayden,* ..... U.S. .....

One writer phrased his criticism of the rule thusly:

> The possession and control rule serves a useful function in separating out those persons who ought never to be permitted to consent to a search. It is

clear, for example, that a complete stranger cannot properly authorize the search of one's home. However, beyond this purely negative function the efficacy of the formula becomes doubtful; the rule is inadequate as a yardstick for determining the propriety of third party consents to search chiefly because in operation it omits consideration of interests of all persons other than the consenter. One with possession and control of a dwelling is, of course, entitled to all the powers that usually flow from such control and normally this would include the power to authorize a police search. However, where others are entitled to constitutional protections in the same areas, it is not clear that the consenter's power should be permitted to be exercised freely at the expense of the rights of these others. The rule itself, without more, does not provide an adequate explanation as to why the consent of one person should dispel the protection due another. 33 U.Chi. L. Rev. 797, 807.

Another has voiced his indignation at the rule saying:

> * * * This theory rests on a fatuous assumption—that rights can belong to property. The fourth amendment confers a personal privilege—the "right of the people to be secure" in their property. There is no justification for the proposition that when two persons have rights in the identical, physical property a component of the complex of juridical relations of each is the power to waive the other's immunity to non-warrant searches. 67 Colum. L.Rev. 130, 148-149.

Moreover, the possession and control rule presents questions the answers to which become ludicrous if the rule is applied. For example, the cases usually arise in situations in which the aggrieved party is not present to object to the search. What is the right of the officer who searched the premises where both co-tenants are present, one voicing his consent to the search and the other indig-

nantly protesting the search? The Supreme Court of California was faced with almost that situation in *Tompkins* v. *Superior Court,* 59 Cal. 2d 65, 378 P.2d 113, 27 Cal. Rep. 889.

In Tompkins, one of two co-tenants of an apartment was apprehended in an automobile and consented to a search of the apartment. But when the police arrived at the premises, defendant (the other co-tenant) refused to allow the search, which was made over his objection. The evidence uncovered by the search was held by the California Supreme Court to be inadmissible against the defendant, saying,

> "A joint occupant's right of privacy is not completely at the mercy of another with whom he shares legal possession." 27 Cal.Rep. 889, 892.

Many state courts have taken the position that the co-tenant cannot consent to a search which would be binding upon the other co-tenant in the absence of a specific showing of authorization to consent to the search. See *e.g. Dalton* v. *State,* 230 Ind. 626, 105 N.E.2d 509, 31 A.L.R. 2d 1071.

The abolition of the possession and control rule should not work any undue burden upon law enforcement agencies. In practically all instances in which it has been applied, including the present case, the investigating officers did not choose to search the premises out of a clear blue sky. They obviously had some information which caused them to focus upon the defendant and his home. A few questions might have elicited the information that the apartment did contain a television set of the type which had been stolen. This information could

have been presented to a magistrate who, if satisfied with its sufficiency, would then have issued a search warrant.

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson* v. *United States,* 333 U.S. 10.

The area of third party consent has only recently come under the scrutiny of this court. In *Stoner* v. *California,* 376 U.S. 483, the court spoke out strongly against third party consents based on theories of agency or apparent authority. In doing so, it rejected the body of private property law as having any relationship to the law surrounding the constitutional right to be free from unreasonable searches and seizures.

The words which this court used in Stoner, "that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's [and that it] was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent," have just as much validity in the case of consent by a co-tenant as in a case of consent by a hotel clerk.

Either the petitioner has a right of privacy in his home regardless of whether he lives alone or the Fourth Amendment prohibitions become meaningless.

We submit that the question of consent by a co-tenant is one which merits this court's attention and certiorari ought to be granted.

3. The next question presented by this petition involves the situation which arises from the use of third party consents as a means of gaining entrance in order to search.

The facts concerning the voluntariness of "consent" are set forth in the statement of facts. They seem to be typical of the methods used by police officers, who, because of laziness or other reasons, refuse to obtain a search warrant: the flash of the badge, the "request" to talk to the person or to search the premises.

Twice this court has had before it that type of police activity and twice it has refused to countenance it. *Amos* v. *United States,* 255 U.S. 313; *Johnson* v. *United States,* 333 U.S. 10. Unfortunately, the lower courts have refused to enforce the rulings of this court. We submit that the "consent" by Miss Hilan to the search of the apartment which she shared with the defendant was under circumstances which were identical to Amos and Johnson. The holding of the Court of Appeals in this case is in direct conflict with those decisions and for that reason certiorari ought to be granted.

4. The last question which we present to this court does not present a question of conflict between courts of appeal for they all seem to follow the rule adhered by the Court of Appeals in this case. That rule is that if a defendant is unsuccessful in his motion to suppress evidence, his petition or his testimony introduced at the hearing on the motion to suppress may be admitted in evidence at the trial against the defendant.

In this case, the defendant testified at the hearing on his motion to suppress. The testimony was for the purpose of showing his right to the privacy of the premises in which the stolen telvision set was found by the agents of the FBI. This testimony contained admissions which tended to prove the petitioner's possession of the television set.

At the trial before a jury, the Government over defendant's objection introduced these admissions in evidence to prove possession.

This action by the government constituted a denial of the defendant's right under the Fifth Amendment against self-incrimination. The defendant had the right to petition the court to suppress evidence regardless of the outcome of that petition. The right to petition courts of the United States for redress of grievances ought not be conditioned upon the waiver of any other right afforded a citizen under the constitution.

The courts of the United States have adopted an inconsistent approach to this question. It has been held that if the defendant prevails in his motion to suppress, his testimony may not be used in the trial of the case in chief; however, if he does not prevail in the motion to suppress, his testimony may be used by the government. The cases are discussed in *Fowler* v. *United States* (10 Cir., 1956) 239 F. 2d 933, 994-995.

These cases, however, were decided before *Jones* v. *United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, and the most recent cases of *Garrity* v. *New Jersey*, 385 U.S. ....., 87 S. Ct. 616, 17 L. Ed. 2d, and *Spevack* v. *Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L. Ed. 2d. .....

In *Jones,* the Court held that where the crime charged may be established through proof solely of possession of the physical thing which the defendant seeks to suppress as evidence, such defendant need not allege and prove possession in his motion to suppress or in the proceedings therfeon. The Court recognized the dilemma in which a defendant is placed: "Since narcotic charges like those in the indictment may be established through proof solely of possession of narcotics, a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him. At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish 'standing' while maintaining a defense to the charge of possession." *Jones* v. *United States,* 362 U.S. 257, 261-262.

While Jones resolved the dilemma to the point that it held that the standing to suppress need not be shown to the extent that it would prove possession. The court, however, did not fully reach the question of whether the evidence introduced to show standing may be used against the defendant, but Mr. Justice Frankfurter's dicta that the use of such evidence was not an inevitable holding seems to indicate the court's thought on the subject.

In *Heller* v. *United States,* (7 Cir., 1932) 57 F. 2d 627, the court held that "having voluntarily become a witness

upon one issue in the case, what he there testified may thereafter be shown against him upon trial of any other issue therein." 57 F. 2d 627, 629.

The vigorous dissent of Judge Evans in that case seems to be more in keeping with the rationale of the *Jones* case and we urge its adoption by the court.

Judge Evans said, "No uncertainty exists as to the soundness of the proposition that incriminating evidence unlawfully seized by federal prohibition officers, pursuant to an unlawful search, may not be used, over proper objections timely made, to secure a conviction of the person from whom the incriminating property has been unlawfully taken. *Weeks* v. *U. S.*, supra.

"It is equally clear, however, that the accused's right to exclude such evidence is dependent upon his proceeding before trial to have such evidence suppressed and returned to him. *Segurola* v. *U. S.*, 275 U.S. 106, 48 S. Ct. 77, 72 L. Ed. 186.

"It was, therefore, necessary for the appellant in this case, in order to protect himself against the use of evidence which he asserts was unlawfully obtained, to make application for a return of the property unlawfully seized. The necessity of applying for the return of the property carried with it the burden of supporting the allegations of his petition by testimony showing the search and seizure were unlawful. The evidence thus given to support such petition is received for no other reason than to protect a constitutional right granted the accused by the Fourth Amendment. If such testimony can only come from the lips of the accused, then his testimony, as well as his petition, should not be sued against him." 57 F.2d 627, 630.

Judge Evans seems to have foretold the action of this Court thirty-five years later in *Garrity* v. *New Jersey,* 385 U.S. ....., 87 S. Ct. 616, 17 L. Ed. 2d ..... and *Spevack* v. *Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d ..... In both *Garrity* and *Spevack,* the Court decided questions concerning whether a penalty of any sort could be assessed against one claiming the protection of the Fifth Amendment. In answering the questions in the negative, the Court in *Garrity* said, "There are rights of a constitutional stature whose exercise a state may not condition by the exaction of a price." 87 S. Ct. 616, 620.

In *Spevack,* the Court said, "In this context, 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin* v. *State of California,* 380 U.S. at 614, 85 S. Ct. at 1233. We held in that case that the Fifth Amendment, operating through the Fourteenth 'forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.' Id., 380 U.S. at 615, 85 S. Ct. at 1233. What we said in *Molloy* and *Griffin* is in the tradition of the broad protection given the privilege at least since *Boyd* v. *United States,* 116 U.S. 616, 634-635, 6 S. Ct. 524, 534-535, 29 L.Ed. 746, where compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself."

One need only substitute "Fourth Amendment" for "Fifth Amendment" to make the court's rulings in *Garrity* and *Spevack* applicable to this case. Indeed, because of the close interplay between those amendments in the operation of the exclusionary rule, the substitution might be deemed superfluous in applying those cases to this. The exercise of the Fourth Amendment right may not be

conditioned by the exaction of the price of using the defendant's testimony in support of that right against him at the trial. This would truly be the imposition of a sanction which makes the assertion of the Fourth Amendment privilege costly.

For this reason, Certiorari ought to be granted.

Conclusion

For the above and foregoing reasons a Writ of Certiorari ought to issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals

Before SCHNACKENBERG, KILEY, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Dominic Daniel Airdo appeals from a judgment of conviction entered upon a jury verdict of guilty on an indictment charging him with unlawful possession of a television set stolen from interstate commerce, in violation of 18 U.S.C. § 659.[1] The defendant does not challenge the sufficiency of the evidence. In urging reversal of his conviction, he relies upon an allegedly fatal defect in the indictment, error in the admission into evidence of a television set allegedly obtained through an unreasonable search and seizure, and various other trial errors.

The indictment charged that on or about October 19, 1965 at Cicero, Illinois the defendant "did unlawfully buy, receive, and have in his possession . . . a Muntz television set Number 18839 . . . which had been . . . stolen . . . from a motor truck and depot of Joseph T. Ryan Cartage Company, Inc., and . . . which did constitute an interstate shipment of freight from Muntz TV, Inc., Wheeling, Illinois, to Hager, Inc., Bridgeport, Connecticut; in violation of Title 18, United States Code, Section 659." The defendant points out that knowledge that the chattel had been stolen is an essential element of the crime charged. He contends that the indictment is fatally defective in failing

[1] The defendant received a sentence of two years' imprisonment.

to specifically allege that he possessed the television set knowing that it had been stolen. We believe the indictment, although imperfectly drafted, sufficiently charged the element of knowledge to state an offense under the relevant portion of 18 U.S.C. §659.

As we stated recently, "an indictment must contain all the elements of the offense charged but it is not insufficient for imperfections of form which are not prejudicial." *United States* v. *Richman,* 369 F.2d 465, 467 (7th Cir. 1966). "The test of sufficiency is whether [the indictment] informs the defendant of what charges he must meet and protects him against double jeopardy." *Id.* In *Richman* we held that an allegation in an indictment charging a violation of 18 U.S.C. § 1341 that the defendant caused parcels to be mailed "for the purpose of executing" a scheme to defraud sufficiently charged the defendant with knowingly causing the items to be delivered by mail. Similarly, in *United States* v. *Parisi,* 365 F.2d 601 (6th Cir. 1966), *vacated on other grounds sub nom. O'Brien* v. *United States,* 35 U.S.L.W. 3329 (U.S. March 20, 1967), the Sixth Circuit held that an indictment charging the defendants with "unlawfully" removing property from a customs bonded area in violation of 18 U.S.C. § 549 sufficiently alleged that the defendants acted knowingly and wilfully.

In the context in which it appears in the instant indictment, the word "unlawfully" supplies the required element of knowledge. Possession of a television set recently stolen from an interstate shipment could be "unlawful" under 18 U.S.C. § 659 only if the possession were accompanied by knowledge that the set had been stolen. The recitations of the indictment necessarily imply knowledge and the statute is satisfied, if not by the statutory terms, by "words of similar import." *United States* v. *Salliey,*

360 F.2d 699, 701 (4th Cir. 1966); *United States* v. *Martell*, 335 F.2d 764, 765-66 (4th Cir. 1964). There is no question, in view of the language used, that the indictment adequately informed the defendant of the charge with which he was faced and that it protects him against a second conviction for the same offense. Nor can the defendant claim that he was prejudiced in any way by the absence of a specific allegation of knowledge. The defendant raised no objection to the omission at the trial. The question whether he knew that the television set had been stolen was the principal issue in the case and the jury was instructed that the defendant could not be found guilty unless such knowledge had been established.

A discussion of the defendant's contention that the television set admitted into evidence should have been excluded as the product of an unreasonable search and seizure requires a brief statement of the testimony given at a hearing on the defendant's motion to suppress evidence, which motion was later denied by the district judge. At approximately 9:00 a.m. on October 19, 1965, two special agents of the Federal Bureau of Investigation rang the doorbell of the second floor walk-up apartment in Cicero, Illinois in which the defendant, a married man, lived with a young woman named Mary Hilan, who was not the defendant's wife, and their nineteen month old daughter. The agents were conducting an investigation into the theft of a shipment of television sets, but had no search warrant. The defendant was not at home. Miss Hilan descended the stairs to the ground floor to answer the bell. The agents identified themselves. According to Miss Hilan's testimony, the agents preceded her up the stairs, stating *en route* that they wished to talk to her. When they reached the open door of the apartment, the

agents caught sight of a television set in one of the rooms. Miss Hilan testified that the agents then expressed the belief that the set might be stolen property and requested permission to inspect it. Permission was granted. A few moments later, the agents asked if they could remove the back of the set to check the serial number. Miss Hilan again said yes. The set later proved to have been stolen.[2]

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[2]At the hearing on the motion to suppress evidence, following the testimony of Miss Hilan and the defendant, the district judge denied the motion on the ground that the defendant had no standing to challenge the reasonableness of the search. The judge's ruling was based upon his observation that "the law requires that a person in order to avail himself of such constitutional right be legitimately on the premises" and that because the defendant was living in the apartment with Miss Hilan "in open and notorious adultery," he was not "legitimately on the premises." This ruling by the district judge was erroneous, and the Government concedes that the defendant had the necessary standing to question the search and seizure of the television set by virtue of his joint occupancy of the apartment. The "legitimately on the premises" test, drawn from *Jones* v. *United States*, 362 U.S. 257, 267 (1960), relates only to the right of the person claiming the privacy of certain premises to be where the search occurred, not to his moral fibre. Thus in *Jones* the Court stated: "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched." *Id.*

The Government apparently recognized the weakness in the district judge's ruling on the motion to suppress. After the trial began, the Government was permitted to reopen the hearing on the motion to offer the testimony of one of the FBI agents. On this appeal, both parties agree that the question of unreasonable search and seizure may be decided as a matter of law.

The FBI agent who testified gave a slightly different version of the events following the agents' identification of themselves to Miss Hilan. He testified that Miss Hilan invited the agents to hold whatever conversation they wished to have with her in the apartment because she did not wish to leave her child unattended. The agent testified that Miss Hilan was advised that the agents were conducting an investigation relating to stolen television sets; that they had received information that she might be in possession of one of these sets; that they desired to inspect the set in her apartment, but that she did not have to permit inspection of it because the agents did not have a search warrant. The agent testified that Miss Hilan offered her full cooperation, stating that she had nothing to hide, and in fact assisted the agents by providing a screwdriver to remove the back of the set.

The defendant maintains that under the circumstances just related Miss Hilan's consent to the examination of the television set was impliedly coerced. He also argues that her consent, even if voluntary, could not operate as a waiver of his constitutional right to be free from unreasonable searches and seizures.

First, we think that under either Miss Hilan's or the agent's version of what occurred in the defendant's apartment, the consent given by Miss Hilan to the agents' inspection of the television set was voluntary. No coercion was applied or threatened and no deception was practiced under either account. The agents did not go to the apartment for the purpose of making a search, nor did they demand entrance to conduct a search under color of their authority, as in *Amos* v. *United States,* 255 U.S. 313 (1921), relied upon by the defendant. The occasion for requesting permission to inspect the television set arose

after the agents were admitted to the apartment. Nothing in Miss Hilan's testimony indicates that she felt constrained to cooperate or that her actions constituted an involuntary submission to authority. Under circumstances which were certainly more compelling than those facing Miss Hilan, we held that consent to a search without a warrant was freely and voluntarily given. *United States* v. *MacLeod,* 207 F.2d 853 (7th Cir. 1953). And see *United States* v. *Sferas,* 210 F.2d 69, 73-74 (7th Cir.), *cert. denied,* 347 U.S. 935 (1954); *United States* v. *Gorman,* 355 F.2d 151, 159 (2d Cir. 1965), *cert. denied,* 384 U.S. 1024 (1966).

The defendant's argument that Miss Hilan's consent could not affect his right to be free from unreasonable searches must also be rejected. In *United States* v. *Sferas, supra* at p. 74, we acknowledged the rule that "where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either." The rule has been applied by other courts to searches following consent given by the wife of the defendant, *e.g., Roberts* v. *United States,* 332 F.2d 892 (8th Cir. 1964), *cert. denied,* 380 U.S. 980 (1965), and by a woman standing in the position of the defendant's wife, *Nelson* v. *California,* 346 F.2d 73, 77 (9th Cir.), *cert. denied,* 382 U.S. 964 (1965). The considerations most applicable to the third person's consent in such cases are not related to principles of agency connecting the defendant with the person acquiescing in the search, but rather concern the reasonableness, under all the circumstances, of a search consented to by a person having immediate control and authority over the premises or property searched. *Cf., Roberts* v. *United States, supra* at 896-97.[3] Miss Hilan

[3] See Note, *Consent Searches: A Reappraisal After Miranda* v. *Arizona,* 67 COLUM. L. REV. 130, 148-50 (1967).

lived in the apartment and therefore had authority to consent to a search of it. Her consent was voluntary and the search was narrowly confined. Under these circumstances, the inspection of the television set was not an unreasonable search prohibited by the fourth amendment.

The defendant raises a further question with respect to his motion to suppress evidence. During the hearing on the motion, in order to establish his standing to object to the seizure of the television set, the defendant admitted that he lived with Miss Hilan in the apartment in which the set was found and that he paid the rent and utility bills. At the trial these admissions were admitted into evidence over an unspecified objection. On this appeal the defendant argues that such use of his testimony on the motion to suppress was a violation of his fifth amendment right not to be compelled to be a witness against himself.

This contention must be rejected for several reasons. First, it has often been held that testimony given by a defendant during an unsuccessful motion to suppress is admissible at his trial. *E.g., United States* v. *Taylor,* 326 F.2d 277 (4th Cir.), *cert. denied,* 377 U.S. 931 (1964); *Fowler* v. *United States,* 239 F.2d 93, 95 (10th Cir. 1956); *Kaiser* v. *United States,* 60 F.2d 410, 413 (8th Cir.), *cert. denied,* 287 U.S. 654 (1932). *Jones* v. *United States,* 362 U.S. 257 (1960), cited by the defendant, is distinguishable. There the Court held that in cases where proof of possession itself is tantamount to conviction of the crime charged, a defendant need not allege and prove possession of property seized as a prerequisite to standing to make a motion to suppress evidence. Here the defendant's admission that he was a tenant in the apartment tended to establish only one element of the offense, possession,

and not the additional requirement of knowledge that the television set was stolen. Second, the impact which the defendant's admissions on the motion to suppress had at the trial can only be assessed as minimal. Following the introduction of this testimony the Government adduced evidence of more critical admissions by the defendant, namely, the defendant's admissions that he purchased the television set for $200 from an applicant for employment in the defendant's trucking business, and that he assumed that the set was "hot" when he purchased it. Finally, the defendant did not assert his rights under the fifth amendment at the trial. He took the stand in his own behalf and was examined in detail concerning the purchase of the set. Under the circumstances, the defendant is not in a position to claim that any violation of his constitutional privilege against self-incrimination occurred through the introduction of his testimony on the motion to suppress.[4]

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[4] The defendant suggests that in accordance with the broad principles underlying the Supreme Court's recent decisions in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), and *Spevack* v. *Klein*, 385 U.S. 511 (1967), we should hold that testimony given by a defendant in attempting to establish a violation of his rights under the fourth amendment on a motion to suppress and used against him at his trial is unconstitutional when the defendant is also claiming the protection of the fifth amendment. We find no occasion to extend *Garrity* and *Spevack* in this manner. As we have stated, the defendant's rights under the fifth amendment were not compromised under the facts in this case by his efforts to secure redress of his rights under the fourth amendment, nor did the defendant invoke the protection of the fifth amendment.

The remaining trial errors alleged by the defendant—that the district judge erred by unduly restricting the defendant's testimony and the cross-examination of witnesses and closing argument by defense counsel—have been considered. We find no merit in the defendant's arguments on these points and reject his contentions without further discussion.

The judgment of the district court is affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Judgment Order of the Court of Appeals

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 459

DOMINIC DANIEL AIRDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1967. A petition for rehearing was denied on July 12, 1967. The petition for a writ of certiorari was filed on August 5, 1967. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to admit at trial petitioner's prior testimony on an unsuccessful motion to suppress, and if so, whether that error was prejudicial.
2. Whether the indictment was fatally defective.
3. Whether evidence obtained with the consent of the person with whom petitioner shared premises was properly admitted in evidence.

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Illinois of unlawfully receiving property stolen from interstate commerce, in violation of 18 U.S.C. 659. On June 9, 1966, he was sentenced to imprisonment for two years. The court of appeals affirmed the conviction (Pet. App. A).

The indictment related to the possession of a Muntz television set stolen from interstate commerce. It was stipulated at trial that the set was stolen from interstate commerce (A. 35-39).[1] Other evidence at trial showed that after F.B.I. agents John Chadwick and Antonius Genakos found the stolen set in the apartment of Miss Mary Hilan,[2] with whom peti-

[1] "A." designates appellant's appendix in the court of appeals which is on file with the Clerk of this Court.

[2] The circumstances giving rise to the discovery of the television set are discussed *infra*, p. 6.

tioner lived, she advised the agents that it was given to her as a gift and telephoned petitioner. On the telephone, petitioner told agent Genakos that Miss Hilan had nothing to do with the television—that he had given it to her. The agents then interviewed petitioner at his place of work. They advised him of his right to counsel and his right to remain silent. Petitioner stated that he had already consulted counsel and explained to the agents that he had bought the television set three months before for $200. Although he would not identify the seller, he stated that he had assumed that it was "hot" when he bought it, and that one week later he had realized that the set was in fact stolen (A. 22-25).

ARGUMENT

1. In order to make a showing of standing at the hearing on the motion to suppress, petitioner testified that he had lived in, and paid the rent for, the apartment in which the television set was found (A. 19-20). These judicial admissions were, over petitioner's objection, received in evidence at trial as part of the government's case-in-chief (A. 40-41).

The question whether testimony of a defendant at a hearing on a motion to suppress may be used as evidence at trial is before this Court in *Thomas Earl Simmons and Robert James Garrett* v. *United States*, No. 55, this Term, certiorari granted, June 12, 1967. We suggest, however, that whatever the Court's disposition of that case, there is no occasion for further review here. Even if the reception of petitioner's

previous testimony in the instant case should be deemed erroneous, such error was clearly harmless. As petitioner's counsel noted in closing argument (A. 57),[3] there was absolutely no controversy that petitioner had possessed the television set which was found in the apartment. Prior to the introduction of the challenged testimony, petitioner's statement that he had purchased the television set for $200 was received in evidence (A. 25). Testifying in his own behalf, petitioner admitted the purchase, claiming only that he had been unaware that the set had been stolen (A. 50-52). We therefore submit that even if the reception of the prior testimony was error, that error, beyond a reasonable doubt, did not contribute to the verdict of the jury. See *Chapman* v. *California*, 386 U.S. 18, 24.

2. So far as pertinent, the indictment charged (A. 4):

> That on or about October 19, 1965, at Cicero, in the Northern District of Illinois, Eastern Division, DOMINIC DANIEL AIRDO, defendant herein, did unlawfully buy, receive, and have in his possession a certain chattel, to wit, a Muntz Television set Number 18839, of a value in excess of One Hundred Dollars ($100.00), which had been embezzled, stolen, and unlawfully taken,

[3] In closing argument, petitioner's counsel affirmatively seized upon the fact that possession was uncontroverted in an attempt to discredit the government's case by pointing out that although Chadwick testified to petitioner's testimony at the motion to suppress—"because there is no issue on it"—he did not testify on the critical issue of knowledge (A. 57).

> carried away, concealed and by fraud and deception obtained from a motor truck * * * which was moving as, which was a part of, and which did constitute an interstate shipment of freight * * *.

Although no motion was addressed to the indictment in the trial court, petitioner contended in the court of appeals that it was fatally defective for failing to allege that petitioner knew that the television set was stolen. The court of appeals properly rejected that argument. Where, as here, no motion attacking the indictment is made until after the verdict, when the case is on appeal, the indictment should be sustained if the necessary elements appear in any form, or by fair construction can be found, within the terms of the indictment. *Hagner* v. *United States*, 285 U.S. 427, 433. Although the indictment did not expressly allege that petitioner knew that the set was stolen, that was the clear implication of the allegation that he had unlawfully received and possessed the television set which had been stolen from interstate commerce. By fair construction, the word "unlawfully" supplied the required element of knowledge, since possession of the television set under 18 U.S.C. 659 would have been unlawful only if petitioner had known that it was stolen. Nor was petitioner prejudiced by the terminology used; the court charged that he could not be convicted unless the jury found that he had received the television set with knowledge that it had been stolen (A. 74).

3. Petitioner contends that evidence relating to the television set found and examined in the apartment

should have been suppressed. Miss Hilan testified that when she answered the downstairs door (from which the stairs led up to her own apartment door), the agents identified themselves, walked to the middle of the stairs, and said, "We want to talk to you"; that they caught sight of the television set in her living-room through the open apartment door; and that she consented to the more thorough examination of the set (A. 14-15; Pet. 4-5). At trial [4] Agent Genakos testified, however, that on October 19, 1965, when Miss Hilan answered the doorbell, the agents identified themselves and told her that they would like to talk to her. Miss Hilan replied that inasmuch as she had a nineteen-month-old baby in her apartment, she would prefer that they converse there, and invited both agents into the apartment in which the television was found (A. 46-47).

Even if Miss Hilan's testimony is credited, there is no showing that the agents uncovered the television set as a result of an illegal search. She testified that the agents viewed the set through the open door to the apartment once they reached the top of the stairs. The television set, according to her testimony, was in

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[4] Miss Hilan testified at a pre-trial hearing on petitioner's motion to suppress. Before the government presented any evidence at that hearing, the district court denied the motion to suppress on the ground that petitioner lacked standing to challenge the legality of the search of the apartment in which he lived under an adulterous relationship. At trial, the government, having doubts as to the correctness of the ruling on standing, was permitted to reopen the hearing on that motion outside the presence of the jury. The government conceded that petitioner had standing in the court of appeals.

open view, and no search was involved. Cf. *Hester* v. *United States*, 265 U.S. 57. Both the government's evidence and Miss Hilan's testimony are in accord that she consented to the examination of the television set after the agents saw it. Since there is no showing whatsoever that that consent was gained by a coercive demand under color of authority, petitioner's reliance upon *Amos* v. *United States*, 255 U.S. 313, and *Johnson* v. *United States*, 333 U.S. 10, is misplaced.

Petitioner further argues that one co-tenant cannot validly consent to a search as against another co-tenant. That question, however, is not presented here. Both petitioner and Miss Hilan told the arresting agents that petitioner had given the television set to Miss Hilan (A. 23, 47). Therefore, petitioner had no interest in the television set, and Miss Hilan could validly consent to the examination of the television set which was hers alone. In any event, it is well settled that "* * * where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either." *United States* v. *Sferas*, 210 F.2d 69, 74 (C.A. 7), certiorari denied, sub nom. *Skally* v. *United States*, 347 U.S. 935; *Roberts* v. *United States*, 332 F.2d 892 (C.A. 8), certiorari denied, 380 U.S. 980; *Nelson* v. *California*, 346 F.2d 73, 77 (C.A. 9), certiorari denied, 382 U.S. 964. Petitioner's argument (Pet. 12-16) that the above rule is an artificial one, and does not respect the right of privacy, is unfounded. Since cotenancy imparts that each co-tenant has rights in the

whole property, there is no reason why either one should not be able to consent to entry and search of the property shared in common.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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